No. 91-1677

In The
Supreme Court of the United States
October Term, 1992

Commissioner of Internal Revenue,
Petitioner,
v.
Keystone Consolidated Industries, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE SUPPORTING PETITIONER

Carol Connor Flowe *
General Counsel

William G. Beyer
Deputy General Counsel

James J. Armbruster
Assistant General Counsel

Marjorie Rosenthal Bloom
Attorney

Pension Benefit Guaranty Corporation
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8820

* Counsel of Record for *Amicus Curiae*

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INTEREST OF THE PENSION BENEFIT GUARANTY CORPORATION

The Pension Benefit Guaranty Corporation ("PBGC") is the federal agency charged by Congress with administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), including the pension plan termination insurance program. *See* 29 U.S.C. §§ 1301-1461.[1] PBGC guarantees retirement

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[1] Rule 37.5 of the Rules of this Court authorizes the filing of a brief *amicus curiae*, without the consent of the parties, "on behalf of any agency of the United States authorized by law to appear on its own behalf when submitted by the agency's authorized legal representative." The PBGC has such legal authority, pursuant to 29 U.S.C. § 1302(b)(1), and previously has filed *amicus* briefs. *See*,

benefits for more than 40 million Americans covered by defined benefit pension plans. *See generally Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).[2]

PBGC's guarantees are triggered when a defined benefit plan terminates without enough assets to pay vested benefits. 29 U.S.C. § 1322. When an underfunded plan terminates, PBGC becomes trustee of the plan, *see* 29 U.S.C. § 1342(b)(1), (c), and pays to participants those basic benefits for which Congress has provided a guarantee, 29 U.S.C. §§ 1322, 1361; 29 C.F.R. pts. 2613, 2621. The money to pay for those guarantees comes from the premiums assessed against all sponsors of PBGC-insured pension plans. *See* 29 U.S.C. §§ 1306-1307. Despite large increases in the premium rates since PBGC was created in 1974, PBGC's deficit has been growing and now stands at $2.5 billion. 1991 PBGC Annual Report at 1. To keep PBGC's deficit from ballooning further and to ensure the continued viability of this government insurance program, PBGC is vigilant about possible pension abuses. *See, e.g., PBGC v. LTV Corp.*, 496 U.S. 633 (1990).

PBGC believes that the Fifth Circuit's decision in this case (Pet. App. 1a) invites serious pension-funding abuse. The Fifth Circuit ruled that the sponsor of a defined benefit pension plan did not engage in a "prohibited transaction" under section 4975 of the Internal Revenue Code when it contributed non-cash property to the plan in payment of its minimum funding obligation. The Fourth

e.g., Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 61 U.S.L.W. 3254 (1992); *Mead Corp. v. Tilley*, 490 U.S. 714, 716 (1989).

[2] Defined benefit plans provide retirees a fixed amount per month based on factors such as final salary and years of service. Such plans differ from defined contribution plans (also known as individual account plans), under which employers typically contribute a percentage of an employee's compensation to an account, and the employee is entitled to the account upon retirement. *See* 29 U.S.C. § 1002(34) and (35).

Circuit reached the opposite conclusion in *Wood v. Commissioner*, 955 F.2d 908 (4th Cir. 1992), Pet. App. 18a.[3]

Allowing non-cash contributions in satisfaction of a plan sponsor's statutory funding obligation creates a tremendous potential for abuse. The plan sponsor is generally the party valuing such non-cash contributions. And a plan sponsor, especially one experiencing financial difficulties, has an incentive to make non-cash contributions to conserve cash and to inflate the value placed on contributed property. In PBGC's experience, the value placed on non-cash property by the plan sponsor at the time of contribution often exceeds the value realized on the property after the pension plan terminates and PBGC becomes plan trustee.

Contribution of overvalued non-cash property by a plan sponsor is harmful in several ways. Not only are the required cash contributions not made, but, because participants continue to accrue benefits, PBGC's possible losses increase as the pension plan becomes more underfunded. Moreover, because the underfunding is concealed by the overvalued contribution, the statutory protections against underfunding (excise taxes, 26 U.S.C. § 4971, and funding suits, 29 U.S.C. § 1132(a)(5), (b)(1)) cannot be brought to bear and PBGC cannot make an informed decision about whether to terminate the plan.[4]

If in such a case the plan sponsor's business prospects do not improve, PBGC's potential losses become actual losses when the pension plan terminates. Moreover, be-

[3] Petitions for writs of certiorari were filed in both this case and *Wood*. This Court granted the petition in *Wood*, 112 S.Ct. 2937 (1992), but the petition was later dismissed, 112 S.Ct. 3061 (1992). Thereafter, the Court granted the Commissioner's petition in this case. 112 S.Ct. 2937 (1992).

[4] Section 1342(a) of Title 29 gives the PBGC authority to initiate plan termination where, *inter alia*, a plan has failed to meet the minimum funding standard or the agency's potential losses will increase unreasonably if the plan is not terminated.

cause the level of benefits guaranteed by PBGC is limited, *see* 29 U.S.C. § 1322; 29 C.F.R. pt. 2621, the participants and beneficiaries of the plan may suffer losses if the plan is underfunded due to a contribution of overvalued property.

Plan sponsors have generally complied with the Department of Labor advisory opinions that non-cash contributions are not permitted in satisfaction of pension funding obligations; accordingly, PBGC has not yet found a large number of cases where non-cash contributions were made. However, where such contributions have been made, the PBGC often has suffered substantial losses.

In one case, a financially troubled plan sponsor contributed to its pension plans shares of its own non-marketable stock, in lieu of cash, to satisfy a $26 million funding obligation. The plan sponsor valued the stock at $26 million. When the plan sponsor filed for bankruptcy shortly thereafter, it terminated its plans, which were underfunded by more than $550 million. And the stock that had been contributed was virtually worthless.

PBGC thereafter filed suit against the plan trustee who had accepted the stock at the inflated value, asserting, among other things, that the stock contribution was a prohibited transaction because it was not for "adequate consideration." *See* 26 U.S.C. § 4975(d)(13); 29 U.S.C. § 1108(e)(1). As successor trustee of the terminated pension plans, the agency sought to recover losses to the plans from this improper transaction. In pursuing the plan trustee, PBGC relied on the Department of Labor advisory opinions interpreting 29 U.S.C. § 1106, the ERISA parallel to 26 U.S.C. § 4975, to prohibit such non-cash contributions.

In the midst of settlement negotiations in that case, the Tax Court issued its opinion in *Wood*, Pet. App. 32a, *rev'd*, Pet. App. 18a. The opinion was used against the PBGC because it rejected the rationale of the Department

of Labor advisory opinions and held that non-cash minimum funding contributions were not prohibited transactions. PBGC subsequently settled the case for $5 million, which it believed at the time, and still believes, was a reasonable settlement; however, the settlement covered only a small portion of PBGC's total loss from this transaction. And as a result of the plans' underfunding at termination, participants lost $55 million to $60 million of benefits not guaranteed by PBGC.

In another recent termination, PBGC learned that the only contribution ever made to the pension plan of the now-bankrupt plan sponsor was a piece of real property. There were approximately $1.4 million in benefits due plan participants. Although the land was valued at $2 million by the plan sponsor at the time it was contributed to the plan in the early 1980's, it now has an estimated market value of only $350,000. While real estate market values have declined in the interim, it nonetheless appears that the original contribution was overvalued significantly. PBGC's funds must now be used to make up the plan's shortfall.

Finally, the facts of the *Wood* case provide a perfect example of the potential for abuse. The minimum funding obligation for the year in question was $114,000. Pet. App. 19a. Rather than co[illegible]te that amount in cash, the plan sponsor contributed [illegible]missory notes with a face value of $114,000. *Id.* The market value of the notes, however, was only $94,430. Pet. App. 20a. Accordingly, the plan actually received $20,000 less than required by the minimum funding rules.

These examples illustrate how non-cash contributions to a defined benefit pension plan can harm the participants, the plan, and the PBGC. For the reasons explained below and in the Commissioner's brief, PBGC believes that Congress intended to prevent such abuses when it enacted the prohibited transaction provisions of ERISA and the Internal Revenue Code. We therefore

urge the Court to reverse the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

The Commissioner of Internal Revenue correctly determined that the non-cash property transfers to Keystone's pension plan were prohibited transactions. Section 4975 of the Internal Revenue Code prohibits insiders from engaging in "any direct or indirect . . . sale or exchange" of property with a pension plan or other benefit plan. 26 U.S.C. § 4975. This broad language unquestionably encompasses a transfer by a plan sponsor to satisfy its statutory funding obligation, for such a transfer is a direct exchange and the functional equivalent of a sale. The employer is causing the plan to exchange (or sell) its right to receive contributions for the property.

The Fifth Circuit held that the transfers in question were not prohibited transactions, however, because it construed section 4975(f)(3) of the Code as limiting the sale-or-exchange prohibition to transfers of *encumbered* property. The court erred. The Commissioner's interpretation does not render section 4975(f)(3) superfluous. That provision broadens the prohibited transaction rules to encompass voluntary contributions that would otherwise not be sales or exchanges. Not only is this the most natural reading of the statutory language, but it is confirmed by the legislative history. The House Conference Report shows that Congress adopted section 4975(f)(3) to prevent parties from circumventing the prohibition on sales or exchanges by mortgaging property and then giving it to a benefit plan. H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5088.

The Fifth Circuit failed to follow the principles established by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Department of Labor had addressed the precise issue presented here in a 1981 opinion letter, finding that transfers like

the ones in this case were prohibited transactions under the parallel ERISA provision, 29 U.S.C. § 1106. The Internal Revenue Service adopted a similar interpretation of the statutory provisions on which ERISA's prohibited transaction rules were based.

Those agency interpretations correctly discerned the congressional intent. But even if there were some ambiguity, the agencies' interpretation is a permissible construction of the statute because it is rational and comports with the statutory scheme. Congress enacted these *per se* prohibitions as preventive measures, to protect against possible abuse. It also set up an administrative procedure under which employers may make transfers such as the ones here, if they can show the Department of Labor that the transactions are in the best interest of the plan's participants and beneficiaries.

ARGUMENT

THE COMMISSIONER CORRECTLY DETERMINED THAT THE NON-CASH PROPERTY TRANSFERS TO THE PENSION PLAN WERE PROHIBITED TRANSACTIONS.

Keystone Consolidated Industries, Inc. ("Keystone") contributed to its defined benefit pension plan five truck terminals and some real estate in Key West, Florida, in purported satisfaction of its minimum funding obligations for the years 1982-84. Pet. App. 1a-2a. None of the property was subject to a mortgage or otherwise encumbered. *Id.* at 12a. The Commissioner of Internal Revenue determined that these transfers were "prohibited transactions" under section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975. *Id.* at 3a.

Section 4975 imposes taxes on a number of prohibited transactions. The parallel provision in ERISA, section 406, states that a plan fiduciary "shall not cause the plan to engage in" those same prohibited transactions, absent

an exemption. 29 U.S.C. § 1106.[5] These *per se* prohibitions were enacted to protect pension plan participants and beneficiaries from transactions thought to be highly susceptible to abuse. *See Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 636-637 (W.D. Wis. 1979); *Leib v. Commissioner*, 88 T.C. 1474, 1481 (1987).

Here, the Commissioner asserted that Keystone's transfer of the truck terminals and the Key West property fell within section 4975(c)(1)(A) of the Code, which prohibits "any direct or indirect . . . sale or exchange . . . of any property between a plan and a disqualified person." 26 U.S.C. § 4975(c)(1)(A). It is undisputed that the pension plan is a "plan" and that Keystone is a "disqualified person" within the meaning of this provision. The only question is whether the transfer of the truck terminals and the Key West property was a "direct or indirect . . . sale or exchange."

The breadth of the statutory language powerfully suggests that it was. As the Commissioner explains (Brief at 15), the transactions were the functional equivalent of selling the property to the plan for cash and then contributing the cash to the plan in satisfaction of the statutory funding obligations. Thus, if not "direct" sales, the transactions clearly were at least "indirect" sales.

Alternatively, the transactions may be viewed as "direct . . . exchange[s]." Keystone exchanged the truck terminals and Key West property for satisfaction of its debts to the pension plan. Conversely, the pension plan exchanged its right to receive contributions (its receivables) for the non-cash property. Either way—as indirect sales or direct exchanges—the plain language of section 4975(c)(1)(A) encompasses and prohibits these transactions.

[5] The prohibited transaction rules in section 4975 of the Internal Revenue Code were added by Title II of ERISA. These provisions, with exceptions not relevant here, are interpreted by the Department of Labor. *See* Reorg. Plan No. 4 of 1978, 3 C.F.R. § 332 (1978), *reprinted in* 5 U.S.C. app. at 1374 (1988), *and in* 92 Stat. 3790 (1978). Title I of ERISA, administered by the Department of Labor, contains prohibited transaction rules that are substantially identical to those in Title II. *See* 29 U.S.C. §§ 406, 408.

The Fifth Circuit did not deny this logic. The court, however, ruled against the Commissioner on the ground that section 4975(f)(3) of the Code limits the reach of section 4975(c)(1)(A) to transactions involving encumbered property. Section 4975(f)(3) provides:

> A transfer of real or personal property by a disqualified person to a plan *shall be treated as* a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

26 U.S.C. § 4975(f)(3) (emphasis added). The court of appeals reasoned that this provision would be superfluous if all transfers of property to a plan were deemed sales or exchanges. Pet. App. 5a. The court read the language of section 4975(f)(3) as "implying that unless it is encumbered by a mortgage or lien, a transfer of property is not to be treated as if it were a sale or exchange." *Id.*

The court of appeals erred in several ways. *First*, it is not true that section 4975(f)(3) would be superfluous under the Commissioner's interpretation of these provisions. The Commissioner's argument rests on the premise that the transfer is being made in satisfaction of an obligation. If there were no obligation and the transfer were purely voluntary, there would be no basis for prohibiting the transaction—in the absence of section 4975(f)(3)—because it would not be a "sale or exchange." Section 4975(f)(3), however, sweeps into the prohibited realm voluntary transfers of encumbered property, by directing that such transfers "shall be treated as a sale or exchange."[6]

[6] PBGC agrees with the Fifth Circuit that, in the case of defined benefit pension plans, it is questionable whether any contribution

Second, it is not true that the language of section 4975(f)(3) necessarily implies that unless the transferred property is encumbered it is not to be considered a sale or exchange. Rather, the statutory directive that transfers of encumbered property be "treated as" sales or exchanges suggests that Congress intended to proscribe such transfers even if they are *not* actually sales or exchanges—if, for example, the transfers are voluntary contributions. It implies nothing about transfers that are, within the ordinary meaning of the words, "direct or indirect . . . sale[s] or exchange[s]."

Third, and perhaps most importantly, the Fifth Circuit erred in disregarding the longstanding interpretation of these provisions by the agencies charged with their enforcement. The Department of Labor, which since 1978 has had primary authority to interpret the prohibited transaction provisions of both ERISA and the Internal Revenue Code,[7] articulated the rationale relied on here by the Commissioner in a 1981 advisory opinion:

> An employer assumes with respect to a defined benefit plan an obligation to make contributions to fund promised benefits. The contribution of the option [to purchase a condominium unit] by the Employer to the Plan constitutes a discharge by the Employer of its legal obligation to make the contribution for that year. *In effect, the Plan is exchanging its legal right to payment of that contribution for property other than cash. Accordingly, the contribution of the option*

can ever be considered "voluntary" because current contributions are credited against future funding obligations and do not, in the absence of a plan amendment, result in greater benefits for participants. *See* Pet. App. 6a. However, as the Commissioner points out (Brief at 13 n.9, 24-25), the prohibited transaction rules also apply to defined contribution pension plans and welfare benefit plans, none of which have statutory funding requirements. Voluntary contributions plainly are an issue for these plans. And in any event, there is no dispute that the contributions in this case were intended by Keystone to satisfy its funding obligations.

[7] See *supra* at 8 n.5.

> *by the Employer is a prohibited sale or exchange* of property between a plan and a party in interest under section 406(a)(1)(A) of ERISA.

Dep't of Lab. Advisory Op. 81-69A, 1981 ERISA LEXIS 24 (July 28, 1981) (emphasis added); *accord* Dep't of Lab. Advisory Op. 90-05A, 1990 ERISA LEXIS 5 (March 29, 1990).

Moreover, that same advisory opinion expressly rejected the argument adopted in this case by the Fifth Circuit—that section 406(c) of ERISA, the parallel to section 4975(f)(3) of the Code, "compels the conclusion that only encumbered contributions of real or personal property by an employer are prohibited by section 406(a)(1)(A)." Dep't of Lab. Advisory Op. 81-69A at 2, 1981 ERISA LEXIS 24. The Labor Department noted that this provision, modeled on tax laws regarding gifts of property to private foundations, prevents parties "from circumventing the section 406(a)(1)(A) prohibition on sales or exchanges by getting a loan on the property and donating it to a plan which must either pay off the loan or give up the property." *Id.* (citing H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 308, *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5088). The applicability of the rule "is limited to voluntary transfers," the Department concluded, and "no inference should be drawn from the rule that a contribution of property by an employer, in discharge of its legal obligation to contribute, would be permissible." *Id.*

The Internal Revenue Service has also adopted the same construction of section 4941 of the Code, the provision upon which section 4975 was modeled.[8] *See* Rev. Rul. 81-40, 1981-1 C.B. 508; Rev. Rul. 77-379, 1977-2 C.B. 387.

This Court has made very clear the analysis the Fifth Circuit should have undertaken in the face of these agency interpretations:

[8] Contrary to the Fifth Circuit's assertion (Pet. App. 8a), section 4941 contains a provision regarding encumbered property (section 4941(d)(2)(A)) that is almost identical to section 4975(f)(3).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-843 (1984) (footnotes omitted) (*quoted in, e.g., PBGC v. LTV Corp.*, 496 U.S. at 647-648; *National Labor Relations Board v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987)).[9]

Had the Fifth Circuit heeded *Chevron*, it could not have reached the conclusion it did. The most logical reading of the plain language of the statutory provisions is the one adopted by the agencies. Congress specified that even "indirect" sales or exchanges between a plan and a disqualified person were to be prohibited. In view of that broad language, and keeping in mind the overriding purpose of protecting benefit plans from transactions sus-

[9] The Fifth Circuit's reasons for refusing deference to the agencies' interpretation do not withstand scrutiny. *See* Pet. App. 7a-8a. The court disregarded the Department of Labor's advisory opinion on the ground that it was "binding only on the parties thereto, and has no precedential effect." Pet. App. 8a. But this Court has made clear that deference principles apply to agency interpretations set forth in opinion letters. *See PBGC v. LTV Corp.*, 496 U.S. at 647-648 (PBGC opinion letters); *Mead Corp. v. Tilley*, 490 U.S. 714, 722 (1989) (same); *Massachusetts v. Morash*, 490 U.S. 107, 118 n.14 (1989) (Department of Labor opinion letter). IRS Revenue Rulings are similar to opinion letters and also are entitled to deference. *CenTRA, Inc. and Central Transport, Inc. v. U.S.*, 953 F.2d 1051 (6th Cir. 1992).

ceptible to abuse, it is almost inconceivable that Congress could have intended section 4975(f)(3) to limit the prohibition to transfers of encumbered property.[10]

The legislative history confirms this interpretation. The Conference Report on ERISA noted that under the conference substitute, "the direct or indirect sale, exchange, or leasing of any property between the plan and a party-in-interest . . . is a prohibited transaction." H.R. Conf. Rep. No. 1280 at 307, 1974 U.S. Code Cong. & Admin. News at 5088. The Report then goes on to say:

> Under this rule, the transaction is prohibited whether or not the property involved is owned by the plan or party-in-interest, and the prohibited transaction includes sales, etc. from the party-in-interest to the plan, and also from the plan to the party-in-interest. *Also*, following the private foundation rules of the tax law, a transfer of property by a party-in-interest to a plan *is treated as a sale or exchange* if the property is subject to a mortgage or a similar lien . . . . *This rule prevents circumvention of the prohibition on sale by mortgaging the property before transfer to the plan.*

Id. at 307-08, 1974 U.S. Code Cong. & Admin. News at 5088 (footnote omitted) (emphasis added). The quoted language makes clear that section 4975(f)(3) was intended to plug a potential loophole in the broad prohibition on insider sales, not to narrowly define "sale or exchange."

Even if the lower courts felt there were some ambiguity, they were not free to "impose [their] own construction

[10] The Fifth Circuit's construction leads to the absurd conclusion that even a direct sale to a pension plan of property for cash would not be prohibited, so long as the property were unencumbered. The taxpayer in *Wood* acknowledged that this could not be. Pet. App. 23a (the taxpayer "readily agrees that if he had funded the plan with cash and then caused the plan to use the cash to purchase the third-party promissory notes from himself, the transaction would be prohibited by § 4975(c)").

on the statute." *Chevron*, 467 U.S. at 843. Rather, their role was to determine whether the Labor Department's and the Commissioner's interpretation was a "'permissible' construction of the statute, that is, a construction that is 'rational and consistent with the statute.'" *PBGC v. LTV Corp.*, 496 U.S. at 650 (quoting *NLRB v. Food & Commercial Workers*, 484 U.S. at 123).

The agencies' interpretation easily passes that test. It is surely rational to say that transfers of property by an employer to a plan in satisfaction of an obligation fall within a prohibition on "direct or indirect . . . sale[s] or exchange[s]." It is also rational to conclude that another provision directing that transfers of encumbered property be "treated as" sales or exchanges should be read, not as *limiting* the broad prohibition to such transfers, but as *expanding* it to make sure that *all* transfers of encumbered property—even those that may be neither sales nor exchanges—are prohibited.

This interpretation is also consistent with the overall statutory scheme. As the Fourth Circuit noted in *Wood*, ERISA's prohibited transaction rules replaced an earlier "arm's length" standard of conduct, which "'require[d] substantial enforcement efforts, resulting in sporadic and uncertain effectiveness of these provisions.'" Pet. App. 24a (quoting S. Rep. No. 383, 93d Cong., 1st Sess. 32, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4890, 4917). ERISA imposed instead the *per se* rules found in section 4975 of the Code and section 406 of ERISA, which were intended to "substantially strengthen" the laws governing prohibited transactions. *Wood*, Pet. App. 24a. "The purpose of designating sales and exchanges of property between insiders and pension plans as prohibited transactions was to ensure pension plan integrity by eliminating even the possibility that such sales or exchanges might not be at arm's length." *Id.* at 24a-25a (citing *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983)). Interpreting these provisions to prevent only

transfers of encumbered property would be contrary to that broad remedial purpose.

The prohibition on sales or exchanges is, moreover, only one of a list of prohibited transactions between a plan and insiders. Section 4975 also prohibits insiders from engaging in any direct or indirect "lending of money or other extension of credit"; "furnishing of goods, services, or facilities"; or generally dealing with the plan or its assets for the benefit of the insider. To the extent it intended exceptions to this extremely broad list of prohibitions, Congress created certain specific "exemptions" in section 4975(d) of the Code and section 408 of ERISA. Only one of them involves the sale or exchange of unencumbered property, and that exemption is applicable only to a narrow and precisely-defined category of property. *See* 26 U.S.C. § 4975(d)(13), incorporating by reference provisions of ERISA § 408(e) relating to "qualifying employer securities" and "qualifying employer real property."

However, Congress directed the Department of Labor and the Internal Revenue Service to establish an exemption procedure under which exemptions may be granted from any of the restrictions in section 4975(c)(1). The Department of Labor may grant such an exemption if the exemption is (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of the plan. 26 U.S.C. § 4975(c)(2); 29 U.S.C. § 1108(a). In administering these provisions, the Department of Labor seeks to ensure, among other protective conditions, that the transaction gives the Plan at least "adequate consideration." *See, e.g.*, 29 C.F.R. § 2570.34(b)(5)(iii) (exemption applications must contain appraisals or market analyses).

Thus, the agencies' position does not absolutely bar non-cash contributions to a defined benefit pension plan. An employer wishing to contribute property in satis-

faction of its funding obligation may do so if it obtains an administrative exemption. The exemption process assures that such contributions will occur only if they do not pose a danger to the plan, the participants, or the PBGC. PBGC believes that this is the result Congress intended when it enacted the prohibited transaction provisions.

CONCLUSION

For the reasons stated above and in the Commissioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

CAROL CONNOR FLOWE *
General Counsel

WILLIAM G. BEYER
Deputy General Counsel

JAMES J. ARMBRUSTER
Assistant General Counsel

MARJORIE ROSENTHAL BLOOM
Attorney

PENSION BENEFIT GUARANTY CORPORATION
2020 K Street, N.W.
Washington, D.C. 20006-1860
(202) 778-8820

* Counsel of Record for *Amicus Curiae*

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